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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1

OPPOSITION OF AT&T CORP. TO SOUTHWESTERN BELL, PACIFIC BELL, AND NEVADA BELL JOINT PETITION FOR PARTIAL STAY, CC DOCKET NOS. 96-262 AND 94-1

Pursuant to the Commission's Public Notice, DA 97-1187, released June 4, 1997, AT&T Corp. ("AT&T") hereby submits the following comments in opposition to the Joint Petition of Southwestern Bell, Pacific Bell, and Nevada Bell ("Petitioners") for Partial Stay, CC Docket Nos. 96-262 and 94-1, filed June 3, 1997 ("Joint Petition").

INTRODUCTION AND SUMMARY

The Joint Petition seeks to stay the effectiveness of certain requirements set forth in two different orders recently adopted by the Commission: (1) the First Report and Order (FCC 97-158), released May 16, 1997, in Access Charge Reform, CC Docket No. 96-262 ("Access Reform Order"); and (2) the Fourth Report and Order in Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, and Second Report and Order, CC Docket No. 96-262 (FCC 97-159), released May 21, 1997 ("LEC Price Cap Order").

Because these orders are separate and distinct from each other, and impose different requirements on the local exchange carriers ("LECs"), the Commission should consider and dispose of these requests for partial stay separately.[1] The Joint Petition has offered no sound justification for combining relief sought against two different orders in the same pleading, and this mixing of stay petitions addressed to two distinct orders undermines the processes of administrative and judicial review.[2]

With respect to the Access Reform Order, the Joint Petition seeks a stay, pending judicial review, of the portions of that order (1) requiring the incumbent LECs to exclude unbundled network elements from Part 69 (interstate) access charges, and (2) directing the LECs subject to price caps to reduce their price cap indices (PCIs) to account for the completion of the amortization of equal access non-capitalized costs. On the other hand, the stays requested by Petitioners concerning the LEC Price Cap Order involve entirely different substantive matters. Thus, the Joint Petition seeks a stay of the portions of the

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1 See, e.g., Order, released June 30, 1995, 10 FCC Rcd. 11979 (denying stay requests against Add-Back Order); Order, released June 30, 1995, 10 FCC Rcd. 11991 (denying stay requests directed to LEC Price Cap Performance Review Order). The Commission dealt with these stay petitions in separate orders although the stay requests were closely related and were filed in part by the same parties and on the same date.

2 The Commission's Rules do not allow for combining in the same pleading different stay requests directed to separate orders of the Commission. See 47 C.F.R. §1.44(e) ("Any request to stay the effectiveness of any decision or order of the Commission shall be filed as a separate pleading.")

In light of the Commission's Public Notice here, we are responding to the Joint Petition in one pleading, although throughout this Opposition we will separately treat these stay requests as relating to different substantive requirements in two distinct orders.

LEC Price Cap Order (1) adjusting the LEC price cap plan to reflect a single productivity offset (X-Factor) of 6.5 percent, and (2) requiring each of the price cap LECs to adjust its individual PCIs, effective July 1, 1997, to the level for the 1997-98 tariff year that would have been in effect had the 6.5 percent X-Factor been effective with the LECs' 1996 annual tariff filings.

For reasons explained below, the Joint Petition's claims that Petitioners are likely to succeed on the merits upon appellate review of these aspects of the Access Reform Order and the LEC Price Cap Order are entirely without basis. Moreover, Petitioners have failed to establish that the balance of the equities favors a stay of either order. Accordingly, the partial stays of the two orders requested in the Joint Petition should be denied.

ARGUMENT

Four well-established criteria govern whether Petitioners are entitled to a stay pending judicial review: (1) the likelihood of success on the merits; (2) whether Petitioners will be irreparably injured absent a stay; (3) whether there will be significant harm to other interested parties if the stay were granted; and (4) whether the public interest will be served. Cuomo v. Nuclear Regulatory Comm'n, 772 F.2d 972 or 974-78 (D.C. Cir. 1985); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir 1977); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). In this case, none of these criteria favors the granting of a stay. As shown in Part I herein, the "equitable" considerations embodied in criteria (2), (3) and (4) all demonstrate that

Petitioners' request for a stay of the LEC Price Cap Order should be denied. The same is true of their request to stay portions of the Access Reform Order, as shown in Part II. Finally, Part III demonstrates that Petitioners have not shown a likelihood of success on the merits with respect to either Order.

I. THE EQUITIES WEIGH DECISIVELY AGAINST A STAY OF THE LEC PRICE CAP ORDER.

The LEC Price Cap Order is one of the most important decisions to emerge from the Commission in recent years. Staying that Order would (a) flatly contravene the public interest by denying consumers the benefit of massive reductions in their long-distance rates; (b) impose serious and irreparable injury on third parties such as AT&T and other long-distance carriers (IXCs), and (c) is not required to prevent any irreparable injury to Petitioners.

A. Staying The LEC Price Cap Order Would Be Flatly Contrary To The Public Interest.

Perhaps the most compelling reason for denying Petitioners' request for a stay of the LEC Price Cap Order is that it would so clearly contravene the public interest -- one of the most important factors in determining whether a stay is appropriate. See, e.g., North Atl. Westbound Freight Ass'n v. FMC, 397 F.2d 683, 685 (D.C. Cir. 1968). The Commission's LEC Price Cap Order has already made the dispositive public interest finding. Specifically, that order reflects a clear judgment that increasing the annual productivity offset to 6.5

percent is in the public interest. See, e.g., LEC Price Cap Order ¶¶ 1 (changes to price cap plan will help "construct a dynamic regulatory framework to further the new pro-competitive, deregulatory paradigm set out in the Telecommunications Act of 1996); 141 ("We are confident that an X-Factor of 6.5 percent can be achieved by the incumbent price cap LEC industry, yet provides a substantial increase over our current price cap plan in the benefits flowed through to price caps customers.").

The basis for that judgment is as straightforward as it is compelling. This reduction, the Commission correctly concluded, will reduce the IXCs' annual access charges by some $1.7 billion in the first year. In light of AT&T's commitment to the Commission and the vigorous competition now existing in the interstate markets, these substantial access savings will be passed on to long-distance customers in the form of significant long-distance rate reductions. As the Commission stated in the LEC Price Cap Order (¶185): "We see nothing to indicate that market forces will not compel IXCs to flow through access charge reductions. We note that at least one IXC [AT&T] has committed to flow through to its long-distance customers all access charge reductions resulting from the access charge-related decision we adopt today." See also the attached declaration of Joel Lubin, Vice President of AT&T (Exhibit 1) (hereafter "Lubin Decl."), at 6. Moreover, these rate reductions will not only benefit individual consumers directly, but will have an overall beneficial impact throughout the national economy: individuals and businesses will enjoy substantial cost savings on telecommunications services, and they will have more money to spend on other goods and services, which in turn will produce a "multiplier effect" that will reverberate through the economy.

Granting a stay, however, would thwart the achievement of these enormous benefits, and would therefore contravene the public interest. Indeed, it is difficult to imagine a stay that would be more pernicious in its impact than the stay sought by Petitioners here.

Petitioners implicitly concede that the public interest will be harmed in the short-run when they argue that, "*in the end*, the public at large would not be harmed" by a stay. Joint Petition at 23 (emphasis added). That concession of short-run harm to the public -- and Petitioners' failure to identify any public-interest benefit from the stay -- is dispositive of the public interest question.

But beyond that, Petitioners are flatly wrong in claiming that a stay would not harm the public "in the end." The basis for this contention is Petitioners' proposal that the Commission adopt an "accounting order" to ensure that the access rate reductions mandated by the LEC Price Cap Order are ultimately refunded to the LECs' IXC customers if (or when) Petitioners' lose on appeal. Joint Petition at 2, 25. But an accounting order will only help ensure a somewhat more accurate calculation of the refunds that the LECs will owe the IXCs. It will not ensure that those refunds are passed on to the IXCs' customers. And it certainly will not, and could not, restore the lost economic benefits that otherwise would result immediately from instant, substantial reductions in long-distance rates, not to mention the significant time value of those reductions to consumers. See Lubin Decl. at 6-7.

B. The Proposed Stay Will Irreparably Harm The Interexchange Carriers.

The proposed stay will impose irreparable injury, not only on the public, but also on interexchange carriers. As explained by Mr. Lubin, the reduction in long-distance rates that will come about as a result of the LEC Price Cap Order will stimulate demand for long-distance services. Lubin Decl. at 7-8. This stimulated demand will, in turn, benefit the IXCs by increasing their revenues and facilitating further efficiencies in their interexchange operations. Id.

A stay of the LEC Price Cap Order will obviously deprive IXCs of this increase in demand during the period in which the stay is in effect. Moreover, subsequent refunds -- with or without Petitioners' proposed accounting order -- cannot restore to the IXCs the benefits they will have lost during the stay period. Id. at 7-8.

C. Petitioners Have Failed To Establish That They Will Be Irreparably Harmed Absent A Stay Of The LEC Price Cap Order.

To weigh in the balance against this enormous, concrete harm to the public and to the IXCs if a stay were granted, Petitioners offer only the most speculative suggestions of irreparable injury to them if a stay is not granted. They acknowledge that "monetary loss" -- which Southwestern Bell calculates at $85 million during the first year -- "generally does not constitute irreparable injury." Joint Petition at 22 (citing Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)). However, Petitioners claim that this case falls within that small class of cases in which "adequate compensatory or other corrective relief" is not "available . . . in the ordinary course of litigation." Wisconsin Gas, 758 F.2d at 674 (quoting Virginia Petroleum Jobbers Ass'n, 259 F.2d at 925). Those arguments fail for three independent reasons.

First, Petitioners' own submission fails to make even a prima facie showing on this key issue. The Joint Petition does not allege, as required by Wisconsin Gas, that the revenue reductions occasioned by the LEC Price Cap Order will in any way "threaten the very existence of [Petitioners'] business." 758 F.2d at 674. Indeed, as Mr. Lubin demonstrates decisively, the earning level of the Petitioners from providing interstate access services are well above the rate of return level prescribed by the Commission, and any LEC revenue losses cannot possibly threaten Petitioners' financial viability. Lubin Decl. at 3-5.

Beyond that, Petitioners expressly acknowledge that "the Commission is empowered to permit LECs to increase their rates to recoup losses incurred as a result of Commission decisions that are invalidated on appeal." Joint Petition at 22.[3] This, of course, suggests

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3 The Commission recently stated that, in the event its mandated LEC access charge reductions are overturned after judicial review, it has the authority to provide relief to the LECs by allowing them to recoup their past revenue losses. As the Commission stated in its Order denying a stay of the LEC Price Cap Performance Review Order, requiring an interim increase in the LECs' X-Factor (10 FCC Rcd. 11991, 11997 (1995)):

> "Recent court decisions suggest that, where appropriate, the agency has discretion, consistent with the Filed Rate Doctrine and the rule against retroactive ratemaking, to consider whether it may be appropriate to permit relief to remedy the effects of an agency order that has been overturned on appeal."

Id. (Citing Natural Gas Clearinghouse v. FERC, 965 F.2d 1066 (D.C. Cir. 1992); Public Utilities Comm'n of California v. FERC, 988 F.2d 154 (D.C. Cir. 1993)).

that Petitioners would ultimately be made whole in the event they prevailed on appeal. However, the Joint Petition makes the conclusory assertion that, because of "ever-expanding competition" in the local exchange markets, "it is unlikely that the Commission could successfully exercise that authority here." Id.

But this conclusion is not just speculative, it finds no support in the very declarations Petitioners have submitted. Indeed, Petitioners' declarant, James L. Jones of Southwestern Bell, cannot even bring himself to support this assertion in the Joint Petition. The best he can do is to claim that competitive pressures make it "uncertain" -- not "unlikely" as the Joint Petition asserts -- that the Commission could effectively exercise its remedial authority to permit Southwestern Bell to recoup its reduced access charges. Jones Decl. ¶ 6. Elsewhere, Mr. Jones claims only that there is "no assurance" that such an effort would be effective (id. ¶ 7), and that it "*could be* an ineffective remedy" (id. emphasis added).[4] On its face, this is a far cry from establishing the *likelihood* of irreparable injury.

Indeed, these statements clearly imply at least a "possibility" that such relief would, in fact, be effective. By itself, this implication "weighs heavily against a claim of irreparable harm." Wisconsin Gas, 758 F.2d at 674 (quoting Virginia Petroleum Jobbers Ass'n, 259 F.2d at 925).

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4 To be sure, Mr. Jones argues that one narrow slice of Southwestern Bell's access business -- high-capacity services -- is already subject to competition. Jones Decl. ¶ 6. But that is obviously not enough to make a future rate increase ineffective as a means of compensating Southwestern Bell for any injury suffered as a result of the Commission's Order. Such a result would require that all, or virtually all, of Southwestern Bell's access business be subject to meaningful competition at that time. Mr. Jones does not, and could not, make any such claim here.

Second, Petitioners' speculative assertions about local competition are contradicted by the available evidence. Indeed, in other proceedings relating to local competition, AT&T has established that the only markets as to which Southwestern Bell even claims to have created the *condition* necessary for competition -- Oklahoma and Kansas -- in fact are far from competitive and, indeed, that Southwestern Bell has not even created the necessary conditions.

As to Oklahoma, the attached affidavit of Steven E. Turner (Exhibit 2), submitted to the Commission earlier this year in CC Docket No. 97-121, shows that, "[n]otwithstanding SWBT's attempt to create the illusion of competition, the fact is that local service competition is almost non-existent in Oklahoma today." Id. at 6. Indeed, Mr. Turner notes that "nowhere in the State of Oklahoma is a single unbundled loop being used for local service." Id. (footnotes omitted). The same is true in Kansas. As to that market, Mr. Turner concludes that:

> "There is, to my knowledge, no facilities-based competition anywhere in Kansas . . . The entire State of Kansas does not yet have a single local exchange customer being served by competitive facilities, or even by an unbundled ILEC loop."

Statement of Steven E. Turner On Behalf Of AT&T Communications Of The Southwest, Southwestern Bell Telephone Company - Kansas' Compliance with Section 271 of the Federal Telecommunications Act of 1996, Kansas Corporation Comm., Docket No. 92 SWBT-411-GIT (Mar. 10, 1997) (Exhibit 3) at 3.

The conclusions -- and the extensive supporting evidence provided in Mr. Turner's statements -- belie any notion that local competition will deprive the FCC of the ability effectively to make Southwestern Bell whole in the event it prevails on appeal. Thus, Ptitioners simply have not made, and cannot make, any showing of irreparable injury here.

Third, in any event, the Commission (as well as the D.C. Circuit) rejected identical contentions a mere two years ago when a number of LECs, including Petitioners here, sought to stay the Commission's earlier order establishing an interim X-Factor to be used in the LECs' price cap plan. There, the various LECs contended that future competitive developments might well make it impossible for the Commission to provide effective relief if those parties prevailed on appeal -- the same argument Petitioners make here. But the Commission correctly rejected that very argument as being "purely speculative" and thus inadequate to support a claim of irreparable injury. 10 FCC Rcd. 11991, 11997-98 (1995). Petitioners have cited no actual competitive developments since then that could lead to any different conclusion now. The Commission should therefore reach the same conclusion that it did two years ago.

II. THE BALANCE OF EQUITIES WEIGHS HEAVILY AGAINST A STAY OF THE ACCESS REFORM ORDER.

Petitioners have also failed to establish that the balance of hardships weighs in favor of granting a stay of the Commission's Access Reform Order.

What is most striking about Petitioners' arguments in this regard is that they have focused only on the alleged harm to them if a stay is not granted. The Joint Petition totally ignores the strong public interest concerns that undergird those aspects of the Access Reform Order that Petitioners have challenged. Although the public-interest impact of that

Order cannot be quantified as readily as the public-interest impact of the LEC Price Cap Order, certainly the Access Reform Order has a comparable impact. Like the LEC Price Cap Order, that Order is designed to move access charges closer to cost, thereby reducing those charges and, with that reduction, further reducing long-distance rates nationwide.

The Access Reform Order, moreover, is designed to further another key objective of the Telecommunications Act of 1996, namely, removing barriers to local exchange competition. The Commission's decision to exclude unbundled network elements from Part 69 interstate access charges -- the focus of the Joint Petition's challenge here -- is central to that objective. Would-be competitive local exchange carriers (or CLECs) such as AT&T simply cannot hope to compete with the incumbent LECs if they must pay interstate access charges *in addition to* the LECs' own long-run incremental cost of providing the network elements necessary for such competition.

Thus, given the strong public interest in creating and sustaining local exchange competition, the public interest weighs heavily against staying that portion of the Access Reform Order that exempts unbundled network elements from interstate access charges. A stay of that Order would plainly delay the onset of local exchange competition -- a delay that obviously benefits the self-interests of Petitioners, but also irreparably harms the interests of the public as well as those of numerous competitive interests.

Petitioners, by contrast, have failed to make the showing of irreparable injury mandated by the courts as a requirement for granting a stay. For reasons explained above, Petitioners' concerns about the possibility of lost revenues are no basis for a stay. And

Petitioners' concerns about the possible loss of customer goodwill (Joint Petition at 21, Jones Decl. at 4, Bauman Decl. at 2) are not only speculative but also are contradicted by the available evidence (see supra at 10 (citing Steven Turner affidavits)). They are also insufficient to establish irreparable injury absent a showing that this loss is likely to occur during the limited period that this case would ordinarily be pending on appeal, or is otherwise "'of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm.'" Wisconsin Gas, 758 F.2d at 674 (quoting Ashland Oil, Inc. v. FTC, 409 F. Supp. 297, 307 (D.D.C.), aff'd, 548 F.2d 977 (D.C. Cir. 1976)) (emphasis in original). Petitioners have made no such allegation, much less a showing that any such loss would occur so quickly. Accordingly, the Joint Petition simply has not established the kind of irreparable injury necessary to outweigh the substantial harms to the public and to third parties that a stay would undoubtedly create.

III. PETITIONERS HAVE NOT SHOWN THE LIKELIHOOD OF SUCCESS ON THE MERITS.

Petitioners have also failed to demonstrate a likelihood of success on the merits of any of their claims with respect to these two Orders, and their requests for a stay of these Orders must fail for that reason as well. The Petitioners challenge (and seek a stay of) portions of the LEC Price Cap Order and the Access Reform Order on the grounds that they are allegedly arbitrary and capacious, constitute retroactive rulemaking, and unlawful in certain other respects.

Initially, it should be recognized that all of the substantive issues encompassed by the stay request involve highly judgmental matters relating to the Commission's regulatory authority. The questions presented relate to ratemaking methodologies and procedures, and as such they are policy judgments that lie at the core of the FCC's expertise. As a result, on appellate review the FCC will be given substantial deference. E.g., Permian Basin Area Rate Cases, 390 U.S. 747, 766-67 (1968); Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221 (D.C. Cir. 1980), cert. denied, 451 U.S. 920 (1981); Alabama Power Co. v. FERC, 993 F.2d 1557 (D.C. Cir. 1993); Connecticut Office of Consumer Counsel v. FCC, 915 F.2d 75 (2d Cir. 1990), cert. denied, 499 U.S. 920 (1991). As the Court of Appeals recognized in Bell Atlantic v. FCC, 79 F.3d 1195, 1202 (D.C. Cir. 1996), the "generality" of the "terms" of the ratemaking standards in the Communications Act "open a rather large area for the free play of agency discretion . . . ." Petitioners will therefore face a deferential standard of judicial review, which by itself significantly diminishes their likelihood of success on the merits.

A. There Is No Valid Basis For Petitioners' Claims Concerning The LEC Price Cap Order.

The Petitioners challenge the LEC Price Cap Order's productivity adjustment on two grounds: that the Commission's adoption of the revised X-Factor to be used in the LECs' price cap formula is arbitrary, and that this X-Factor should not be applied "retroactively." Neither claim has any merit. Indeed, virtually the same arguments were raised by the LEC petitioners before the D.C. Circuit in Bell Atlantic v. FCC, supra, and were squarely rejected by that Court. See 79 F.3d at 1202-1205.

1. The Revised X-Factor.

The Commission adopted its LEC Price Cap Order on the basis of a voluminous record provided in response to the Commission's Fourth Further Notice of Proposed Rulemaking in CC Docket No. 94-1, 10 FCC Rcd. 13659 (Sept. 27, 1995). In that Order, based on extensive findings, the Commission concluded that it should base its X-Factor determination on the total factor productivity (TFP) methodology and on the recognition of an input price differential, and that the record supports prescribing a single X-Factor of 6.5 percent, based on its determinations regarding a reasonable method of calculating LEC TFP and the input price differential, and retaining the 0.5 percent consumer productivity dividend (CPD). LEC Price Cap Order ¶ 8.

The Petitioners argue that the Commission "arbitrarily" selected the 6.5 percent X-Factor. The Joint Petition (at 15) quarrels, in particular, with the Commission's selection of an X-Factor on the basis of averages contained in a table set forth at paragraph 137 of the LEC Price Cap Order. That table shows an array of X-Factor averages, ranging from 5.2 percent to 6.1 percent, as computed by experts on the Commission Staff, and ranging from 6.2 to 7.3 percent, as computed in AT&T's studies, which the Commission recognized produced valid results. The Petitioners claim that the Commission should have chosen the very lowest number (5.2 percent) instead of selecting 6.0 percent. Joint Petition at 15. Contrary to the Petitioners' assertions that the Commission "failed" to explain its selection and discuss "why its analysis was . . . valid" (id. at 16), the Commission did just that -- it thoroughly explained the bases for its analysis and the reasons for its selection of a 6.0 percent X-Factor (prior to the inclusion of the CPD). LEC Price Cap Order at ¶¶ 136-140.

To succeed on the merits, Petitioners would be required to demonstrate that a Commission decision to adopt a particular method for ratemaking purposes represents a clear error in judgment.[5] This is a heavy burden that has rarely, if ever, been met in analogous past cases.

Indeed, the selection of an X-Factor necessarily involves a large element of judgment and discretion. The record in the LEC Price Cap Performance Review proceeding (CC Docket No. 94-1) contains a wide range of productivity estimates -- ranging from USTA's estimate of 2.7 to 3.1 percent, on the low side, to estimates by AT&T, Ad Hoc, and MCI ranging between 8.0 and 10.0 percent. See LEC Price Cap Order at ¶ 136. The range of possibilities is at least as wide as the range of reasonable rates of return that are typically presented in rate-of-return cases. The productivity measure that the Commission selected is well below the highest estimates and well above the lowest estimates.

The Commission's selection of the X-Factor in these circumstances represents the type of decision that reviewing courts are not likely to overturn. A determination that an agency's selection of the 6.5 percent X-Factor is a clear error in judgment would

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5 See, e.g., Bowman Transp. Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974); Computer & Communications Indus. Ass'n v. FCC, 693 F.2d 198, 219 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

presumably require a judicial determination that some other number, or at least some other range of numbers, is plainly correct. A reviewing court would hardly be in any position to make such a determination and would very likely defer to the Commission's expertise. See Bell Atlantic v. FCC, 79 F.3d at 1202-04. Nothing in the Joint Petition indicates that Petitioners will be able to demonstrate that a particular number is the clearly correct X-Factor, or that the Commission's selection is clearly outside the range of reasonableness.

Similarly, there is no sound basis for the Joint Petition's attack (at 16-18) on the Commission's decision to retain the 0.5 percent consumer productivity dividend, or for the assertion that the Commission "has not properly explained" its reasons for continuing the CPD at this level. Here again, the Commission provided a thorough explanation of the reasons supporting its conclusion. LEC Price Cap Order ¶¶ 122-127. The Commission noted that retention of the 0.5 percent CPD in the revised price cap plan was appropriate in light of its decision to adopt a single fixed X-Factor (instead of multiple X-Factors) and to eliminate the current sharing requirements. Id. ¶ 123. Further, the Commission explained how its conclusion is justified by current marketplace conditions and its desire that the LECs continue to have productivity incentives and continue to transfer a portion of their productivity gains to consumers. Id. ¶¶ 125-26. This reasoning certainly represents a "thorough and convincing explanation of why" the Commission decided to retain the CPD, and there is no basis to dispute that conclusion upon appellate review. See Bell Atlantic v. FCC, 79 F.3d at 1204.

2. Alleged "Retroactivity."

Finally, there is no merit to the Joint Petition's claim (at 18-19) that the "retroactive adjustment" in the LEC Price Cap Order is invalid. This same type of argument was rejected by the Court of Appeals in Bell Atlantic v. FCC, 79 F.3d at 1204-05. The Court found that there is nothing impermissibly "retroactive" in the Commission's decision to apply its newly adopted interim X-Factor increase in a manner as if this higher X-Factor had been in effect all along. The Court recognized that it was entirely proper for the Commission to adjust the price cap indices to a level that would have more accurately reflected the LECs' costs and productivity, and prevent past Commission underestimates of the X-Factor from being embedded in future rates. Id. at 1205. The Commission's adjustments "would affect future rates only," and "were not intended to reclaim revenues" earned in the past. The Court recognized that the FCC's "adjustments therefore have no retroactive effect" and did not constitute unlawful retroactive rulemaking. Id.(citing Administration of the Tulane Educ. Fund v. Shalala, 987 F.2d 790, 798 (D.C. Cir. 1993)).

In the LEC Price Cap Order, the Commission made the very same type of adjustment that was endorsed in Bell Atlantic. See LEC Price Cap Order ¶¶ 177-179. Petitioners have failed to provide any valid distinctions between the adjustment required in the instant Order and that involved in Bell Atlantic. Petitioners'Their contention that the Commission's adjustment in the LEC Price Cap Order is somehow "methodologically different" from that previously approved by the D.C. Circuit (Joint Petition at 18-19) is bewildering, irrelevant, and without any substantive basis.

B. Petitioners' Claims Regarding The Access Reform Order Are Meritless.

With respect to the Access Reform Order, Petitioners seek a stay of two discrete aspects of that Order, neither of which has anything to do with the LEC Price Cap Order. First, they allege that the Access Reform Order's exclusion from unbundled network elements of Part 69 interstate access charges is invalid, as contrary to the Eighth Circuit's stay order and otherwise arbitrary and capricious. Joint Petition at 5-11. Second, they contend that the Commission improperly "changed its mind" and now directed that the LECs make a downward adjustment in their price cap indices to reflect the completion of the amortization of pre-price cap equal access non-capitalized expenses. Id. at 12-14. Each of Petitioners' assertions is entirely baseless.

1. Exclusion of Interstate Access Charges from Unbundled Network Elements.

The Joint Petition's attack on the Commission's exclusion of access charges from unbundled network elements (Joint Petition at 5-11) relies largely on an invalid comparison between two different rules adopted in two different orders in two different proceedings pursuant to different statutory authority. Petitioners refer first to the stay order imposed by the U.S. Court of Appeals for the Eighth Circuit in its review of the Commission's 1996 Interconnection Order. See Iowa Utils. Bd. v. FCC, 109 F.3d 418 (8th Cir. 1996). In that case the Court stayed, pending judicial review, various FCC rules adopted in that Order pursuant to its statutory duty to implement the local competition provisions of the Telecommunications Act of 1996 (the "1996 Act"). In particular, the Court decided to stay the various pricing provisions dealing with local (intrastate) services, namely sections 51.501-51.515 (inclusive), 51.601-51.611 (inclusive), and 51.701-51.717 (inclusive) of the FCC's Rules. See 109 F.3d at 421 n.3.

The petitioners in that appeal "allege[d] primarily that the FCC exceeded its jurisdiction by imposing material pricing rules for what is essentially local [intrastate] service." Id. at 423. Because the Court entertained doubts whether the FCC had "jurisdiction to establish pricing regulations regarding intrastate telephone services," it decided to grant the stay of the various rules adopted in the Interconnection Order pursuant to the provisions of the 1996 Act. Id. at 425.

Petitioners highlight only one of these rules, namely Section 51.515, which provided that "[n]either the interstate access charges . . . nor comparable intrastate access charges shall be assessed by an incumbent LEC on purchasers of elements that offer telephone exchange or exchange access service." Joint Petition at 5-6 (emphasis added). It is evident from the Eighth Circuit's opinion granting the stay that its concern was directed only to the FCC's authority over "intrastate access charges."

The Joint Petition then points to a portion of the Access Reform Order (¶ 337) in which the Commission held that it will "exclude unbundled network elements from Part 69 access charges." The provisions of Part 69, however, apply solely to interstate access charges (47 C.F.R. § 69.1),[6] and the Commission did not purport in the Access Reform Order to assert regulatory authority over intrastate access charges.

It is simply wrong, therefore, for the Joint Petition to claim (at 6) that in the Access Reform Order "the Commission has effectively imposed the same rule that the Eighth Circuit stayed as part of the Interconnection Order" (emphasis added). The statement in the Access Reform Order is not the "same rule" as that before the Eighth Circuit. It dealt only with interstate access charges for which it is well-established that the Commission has regulatory authority pursuant to provisions of the Communications Act. See e.g., 47 U.S.C. §§ 201-203, 205; see also National Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984).[7] In the Eighth Circuit case, no issue has been raised concerning the jurisdiction of the Commission to regulate interstate access charges, and the only part of

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6 Part 69 "establishes rules for access charges for interstate or foreign services provided by telephone companies . . ." 47 C.F.R. § 69.1.

7 The decision of the U.S. Court of Appeals for the Fourth Circuit in North Carolina Utilities Commission v. FCC, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977), which was endorsed by the D.C. Circuit's decision in NARUC v. FCC, 737 F.2d at 1114, is instructive on the issue here. The Fourth Circuit's decision upheld an FCC order setting conditions under which terminal equipment could be connected to local telephone company lines. Referring to an argument that the FCC lacked jurisdiction over some portion of this equipment because it was used primarily for local calls, and that Congress had withdrawn from (or denied to) the Commission the authority over purely local service, the Court stated: "The withdrawal of [FCC] jurisdiction over one cannot be read to mean the withdrawal as to the other," 552 F.2d at 1046, and that there was no basis for divesting the FCC of its "paramount" interstate regulatory authority. Id. at 1043. So too here: Even if the Eighth Circuit were to hold that the FCC lacks authority to exclude from access charges unbundled network elements used to provide intrastate services, the withdrawal of that authority from the FCC could not possibly affect the FCC's unquestioned authority to regulate interstate access charges. The latter indisputably falls within the core of the Commission's authority and jurisdiction.

Rule 51.515 being questioned there related to intrastate access charges (which are not involved in the Access Reform Order).

It is untenable, therefore, for the Petitioners to claim here that paragraph 337 of the Access Reform Order is in "conflict" with the Eighth Circuit's stay order.[8]

2. Adjustment for Completion of Equal Access Cost Amortizations.

The Commission also reached an eminently reasonable decision in requiring the price cap LECs to make a downward adjustment in their PCIs to reflect the completion of the amortization of the equal access non-capitalized expenses previously ordered by the Commission. Access Reform Order ¶¶ 302-314. The Commission found that the "baseline" BOC rates in effect at the time the LEC price cap regime was instituted were abnormally affected (i.e. distorted) by the Commission's past requirement that there be a temporary amortization of these equal access costs. This amortization was completed after the inception of LEC price cap regulation, and thus the Commission directed an exogenous adjustment of the LEC PCIs to account for the cessation of this amortization. As its rationale, the Commission stated that: "We are convinced that this treatment is the proper method to ensure that ratepayers are not paying for costs that have already been completely recovered." Id. ¶ 302.

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8 Equally without merit are the Joint Petition's assertions (at 7-11) that this portion of the Access Reform Order is "arbitrary and capricious." The Commission provided a thorough and complete explanation of its conclusions, and it reached an entirely reasonable result based on the record. Access Reform Order ¶¶ 337-40.

The Petitioners attack this section of the Access Reform Order essentially on two grounds: that the Commission had "changed its mind," and that its decision does "not rely upon the current record." Joint Petition at 12-13. Each of these arguments is baseless.

There is nothing wrong with the Commission's changing its mind in the context of a rulemaking proceeding. See, e.g., PSWF Corp. v. FCC, 108 F.3d 354, 357 (D.C. Cir. 1997) ("agencies may change their minds in the course of a rulemaking, even though those affected may be disappointed."); Busse Broad. Corp. v. FCC, 87 F.3d 1456, 1465 (D.C. Cir. 1996) ("Agencies may modify and even reverse precedent . . . so long as they provide an 'adequate explanation' for doing so"); Bell Atlantic v. FCC, supra, 79 F.3d at 1202. Indeed, there is nothing at all improper about the Commission's changing its course, provided it recognizes the change and explains its reasons for doing so. See, e.g., Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1971); Petroleum Communications Corp. v. FCC, 22 F.3d 1164, 1172 (D.C. Cir. 1994). The Commission here explicitly followed these standards. It repeatedly acknowledged that it was changing its past conclusions regarding the price cap treatment of the completion of equal access amortizations. See Equal Access Order at ¶¶ 302, 310. Moreover, the Commission provided a detailed and complete analysis, fully justifying its changed conclusion. Id. ¶¶ 302-14.

Furthermore, there is no merit to the Petitioners' argument that the Commission did not base its conclusion on the "current record." Initially, as long as the Commission expressly recognized its change (which it did) and adequately explained it (which it also did), there is no requirement that the Commission's revisited conclusion be based on the current record. It may reanalyze past data and previous determinations to come to another conclusion. The fact is, however, that the Commission did examine in great detail the record in the current Access Charge Reform proceeding (CC Docket No. 96-262), especially the Comments submitted in response to its NPRM therein. See, e.g., Access Reform Order ¶ 299, n. 409. Moreover, it performed a thorough analysis of past Commission precedents and analogous price cap treatments to justify its decision. Id. at ¶¶ 302-314. In all respects, the Commission fully satisfied the standards of reasoned decisionmaking.

CONCLUSION

For the reasons stated herein, the Commission should deny the Joint Petition's request for partial stays of the LEC Price Cap Order and the Access Reform Order.

Respectfully submitted,

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